

Anonymised version

Translation

C-805/19 — 1

Case C-805/19

Request for a preliminary ruling

Date lodged:

31 October 2019

Referring court:

Landesgericht Salzburg (Austria)

Date of the decision to refer:

25 October 2019

Applicant:

CT

Defendant:

VINI GmbH

ORDER

[...]

Concerning:

EUR 1 497.91 plus interest and costs (special payment)

I. Pursuant to Article 267 of the Treaty on the Functioning of the European Union, the following question is referred to the Court of Justice of the European Union for a preliminary ruling:

Are Article 31 of the Charter of Fundamental Rights of the European Union (2010/C 83/02) and Article 7(2) of Directive 2003/88/EC (the Working Time Directive) to be interpreted as meaning that the rule of national law laid down in Paragraph 10(2) of the Urlaubsgesetz (Austrian Law on Annual Leave, ‘the UrlG’), under which a payment in lieu of annual leave in respect of the current

(last) working year is not payable if the worker resigns prematurely, is not applicable.

II. [...] [Stay of proceedings]

Grounds:

1. Claims

The applicant, who is resident in the Czech Republic, submits that on 28 November 2018 [**Or. 2**] she took up employment with the defendant as an assistant waitress. On 23 January 2019 she fell ill and was unable to work up to, and including, 29 January 2019. On Wednesday, 30 January 2019 the defendant's restaurant was closed. On Thursday, 31 January 2019 the applicant showed up for work. The defendant's manager, Mr Viktor Lugert, informed the applicant that he no longer needed her and that the employment relationship had terminated. The applicant submits that it should be assumed that the defendant dismissed her in breach of the applicable notice period and termination date. For reasons that are not clear, she was de-registered by the defendant, with retroactive effect from 1 February 2019, and recorded as having resigned prematurely without cause. However, the applicant states that she never resigned as the defendant alleges. She had not taken any paid annual leave. She submits that she is therefore entitled to bring a claim for, inter alia, a payment in lieu of annual leave in respect of 5.42 working days.

The defendant concedes that the applicant was on sick leave during the period from 23 January 2019 to 29 January 2019. According to the defendant, its restaurant was closed on 30 January 2019 and on 31 January 2019 the applicant was not due to work. However, contrary to the applicant's allegations, she was not dismissed by Mr. Lugert, as the defendant's manager, on 31 January 2019, but rather she unjustifiably failed to show up for work in February 2019, despite being requested to do so. The defendant submits that the applicant must therefore be assumed to have resigned prematurely without cause. As she failed to come to work from 1 February 2019, the applicant's registration with the district health insurance fund was cancelled on 7 February 2019, whereby it was recorded that the date of resignation was 1 February 2019 and the reason for de-registration was, according to the defendant, correctly specified as being premature resignation without cause. The applicant had already taken up new employment several days later.

It is stated that proceedings for the taking of evidence have not yet been concluded by the referring court, but such proceedings are not necessary in relation to the question referred for the present claim if, unlike under Paragraph 10(2) of the UrlG, the applicant is already entitled, under EU law, to payment in lieu of annual leave.

2. National legislation

Paragraph 10(1) of the UrlG. For the leave year in which the employment relationship ends, the employee shall be entitled, at the time the employment relationship ends, to a payment in lieu of annual leave corresponding to the length of service in that leave year as a proportion of the entire leave year. Annual leave already taken shall be deducted from the pro rata amount of annual leave entitlement. The employee shall not be required to repay an annual leave payment in respect of annual leave taken in excess of the pro rata amount, save where the employment relationship ends as a result of:

1. premature resignation without cause; or [Or. 3]

2. dismissal for cause.

The amount to be repaid shall be equivalent to the amount of the annual leave payment received that exceeds the annual leave entitlement at the time annual leave is taken.

(2) A payment in lieu of annual leave shall not be payable where the employee resigns prematurely without good cause.

...

3. Grounds for the reference

The provisions of the UrlG must be interpreted in conformity with the Working Time Directive.

Paragraph 10(2) of the UrlG relates only to annual leave entitlement for the leave year in which the resignation occurs. Entitlement in respect of previous years is not affected and a payment must be made in lieu thereof [...].

No payment in lieu of annual leave is payable under the applicable legislation in the event of a resignation without cause. The exclusion of the entitlement is clearly intended to discourage employees from terminating their contract prematurely without proper consideration, and to provide the employer with a degree of financial relief where a contract has been terminated in circumstances that are largely prejudicial to the employer.

With reference to the judgments of the Court of Justice (C-341/15, *Maschek*, ECLI:EU:C:2016:576 [...]; see also judgment C-282/10, *Dominguez*, [...]; C-337/10, *Neidel*, ECLI:EU:C:2012:263 [...]; C-118/13, *Bollacke*, ECLI:EU:C:2014:1755 [...]), Austrian academic writers have stated that it follows from Article 7(2) of the Working Time Directive 2003/88/EC that an employee is entitled to a payment in lieu of unused annual leave irrespective of the manner in which the employment relationship ends. Against this background,

Paragraph 10(2) of the UrlG seems questionable from the point of view of EU law.

More recently, academic writers have noted that in the existing case-law of the Court of Justice there is no equivalent to the exception in respect of premature resignation provided for in Paragraph 10(2) of the UrlG [...].

There exists no decision by a national court on this issue. [Or. 4]

4. The interpretative jurisdiction of the Court of Justice

In the present case, there is indeed already case-law of the Court of Justice of the European Union concerning workers' entitlement to annual leave. However, there is no express decision by the Court of Justice to the effect that an employee does not lose his or her entitlement to a pro rata payment in lieu of annual leave for the current working year even where he or she has terminated the employment relationship with immediate effect (without giving due notice). In that regard, the reasons for the rule of national law laid down in Paragraph 10(2) of the UrlG, as set out above, have, in particular, not been considered as part of a comparison of the interests of the employer with those of the employee, taking into account the fundamental right laid down in Article 31 of the Charter of Fundamental Rights.

In the light of the existing case-law of the Court of Justice of the European Union, the correct application of Community law is not so obvious that it leaves no scope for any reasonable doubt as to the decision to be made on the question referred ('acte clair').

II. [...]

Landesgericht Salzburg als Arbeits- und Sozialgericht (Salzburg Regional Court, sitting as Labour and Social Court), [...]

Salzburg, 25.10.2019

[...]