

Case C-217/20

Request for a preliminary ruling

Date lodged:

20 May 2020

Referring court:

Rechtbank Overijssel (Netherlands)

Date of the decision to refer:

20 May 2020

Applicant:

XXXX

Defendant:

Staatssecretaris van Financiën

Judgment

RECHTBANK OVERIJSEL (DISTRICT COURT, OVERIJSEL)

Sitting in Zwolle

Administrative law

...

interim judgment of the full-bench division in the dispute between:

... applicant,

...

and

the staatssecretaris van Financiën (State Secretary for Finance), defendant ...

....

Procedure

The applicant raised an objection with regard to the amount of his remuneration during his annual leave in the period from 25 July 2017 to 17 August 2017, as set out in his salary slips for July and August 2017.

By decision of 13 October 2017 ('the contested decision'), the defendant declared the applicant's objections unfounded.

The applicant brought an appeal against that decision.

The defendant lodged a statement of defence.

The hearing took place on 21 September 2018.

Following discussion at the hearing, the Rechtbank decided to reopen the investigation in order to refer a question to the Court of Justice of the European Union for a preliminary ruling.

Grounds

1. The applicant has been employed by the Belastingdienst (Netherlands tax authorities) since 1 March 2002, most recently, since 1 November 2014, as an investigating officer. Since 24 November 2015, the applicant has been partially incapacitated for work on a long-term basis. He is currently engaged in a reintegration process.

Pursuant to Article 37(1) of the Algemeen Rijksambtenarenreglement (General Civil Service Regulations; 'the ARAR'), the applicant was paid 100% of his remuneration for the first year of illness and, since 24 November 2016, has continued to be paid at the rate of 70%. Pursuant to Article 37(5) of the ARAR, the applicant is paid at the rate of 100% for the hours for which he is fit for work.

The applicant took annual leave for the period from 25 July 2017 to 17 August 2017. According to the salary slips for the months of July and August 2017, the applicant was (also) paid at the rate of 70% for the hours for which he was incapacitated for work during the leave period and at the rate of 100% for the hours for which he was deemed fit for work, at least to the extent that he was able to work in the context of his reintegration.

The applicant does not agree with this. He believes that he is entitled to full remuneration during the leave taken, that is to say also for the hours for which he is incapacitated for work on a long-term basis. The applicant relies in that regard on the provisions of Article 22 of the ARAR, on 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) and on the case-law of the Court of Justice of the EU ('Court of Justice'), in particular the

judgment of 20 January 2009, *Schultz and Stringer* (C-350/06 and C-520/06, EU:C:2009:18). The applicant also refers to Article 31(2) of the Charter of Fundamental Rights of the European Union.

2. In a letter of 28 August 2017, the defendant stated that the only point of dispute concerns the interpretation of the EU law term ‘paid’ (*behoud van loon*) and, by extension, ‘on full pay’ (*behoud van zijn volle bezoldiging*) in Article 22 of the ARAR. In the absence of EU case-law on that subject, the defendant asks the Rechtbank to refer the matter to the Court of Justice for a preliminary ruling.

3. The Rechtbank finds as follows.

3.1 Article 22 ARAR

Article 22(1) of the ARAR provides that an official is entitled to annual leave on full pay.

The Rechtbank is in agreement with the defendant that ‘full pay’ in this context should be taken to mean remuneration as applicable to the official concerned at the beginning and during the period of leave. In the applicant’s case, that was 70% of the remuneration for the hours for which he is incapacitated for work and 100% for the hours for which he is fit for work. That is also the remuneration received by the applicant during the entire period of leave from 25 July 2017 to 17 August 2017 with retention of his full salary.

3.2 Directive 2003/88/EC

Article 7(1) of Directive 2003/88/EC provides that Member States must take the measures necessary to ensure that every worker is entitled to paid annual leave in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

The Rechtbank infers from the text of and the preamble to that directive that the European legislature’s aim was to lay down rules on health and safety in the field of the organisation of working time inter alia with regard to annual leave. In the opinion of the Rechtbank, the directive and its interpretation by the Court of Justice merely guarantee that, even in the case of total incapacity for work, at least four weeks’ paid leave may be taken. The directive does not make any pronouncement on the level of remuneration to be paid during that leave period.

The applicant took four consecutive weeks of leave on his normal remuneration. His right to take paid leave was therefore not restricted.

3.3 *Schultz and Stringer* judgment

In that judgment the Court of Justice found, referring to its judgment of 16 March 2006, *Robinson and Steele* (C-131/04 and C-257/04, EU:C:2006:177), that workers must receive their normal remuneration during their leave. According to the Court, the entitlement to leave and the entitlement to payment must be regarded as a single right.

The implication of that finding is that, during the annual leave/rest period, the worker is placed in a position comparable, in terms of remuneration, to that during the period worked. In the applicant's case, that is the period during which he is partly fit for work but otherwise incapacitated for work. Since the applicant received the same remuneration during the leave period as during the rest of the year, that is in line with the *Schultz and Stringer* judgment.

Article 2(f) of the *Bezoldigingsbesluit Burgerlijke Rijksambtenaren 1984* (Civil Servants Pay Decree 1984; '**BBRA 1984**'), however, provides that remuneration comprises the sum of

- salary;
- allowances, referred to in Chapter III;
- periodic supplement, referred to in Article 22a, and
- monthly supplement, referred to in Article 22b,

to which the official is entitled.

Under Article 2(a), 'salary' means: the amount determined for the official, in accordance with the provisions of that besluit, on the basis of one of the annexes to that besluit, multiplied by the hours of work applicable to the official concerned.

Since, under Article 37(1) of the ARAR, only 70% of the remuneration is paid in the second year of incapacity for work, it could also be argued that that is therefore never the full remuneration referred to in Article 22 of the ARAR. In that regard, the *Rechtbank* notes that, in paragraph 25 of the *Schultz-Stringer* judgment, the Court of Justice held that the purpose of the entitlement to paid annual leave is to enable the worker to rest and to enjoy a period of relaxation and leisure. The Court considered that, in that respect, the purpose of the entitlement to annual leave is different to that of the entitlement to sick leave. The latter is granted to the worker so that he can recover from being ill.

The *Rechtbank* questions whether that distinction justifies the difference.

3.4 Article 31(2) of the Charter of Fundamental Rights of the European Union provides, in so far as it is relevant here, that every worker has the right to an annual period of paid leave.

3.5 In the light of the foregoing considerations, the *Rechtbank* sees sufficient reason to refer the following questions to the Court of Justice for a preliminary ruling.

Article 7

'Must Article 17(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 meaning that a worker does not lose his remuneration, or part thereof, because he exercises his right to annual leave? Or should that provision be interpreted as meaning that a worker retains his remuneration while exercising his right to annual leave, irrespective of the reason for not working during the leave period?’

‘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 provisions and practices whereby a worker who is incapacitated for work due to illness, when taking his annual leave, retains his remuneration at the level it was immediately prior to his taking annual leave, even if, on account of the long duration of his incapacity for work, that remuneration is lower than that paid in the event of full fitness for work?’

‘Must the entitlement of every worker to paid annual leave under Article 7 of Directive 2003/88/EC and the European Parliament and under settled EU case-law be interpreted as meaning that reducing that remuneration during leave taken during incapacity for work runs counter to that entitlement?’

3.6 The Rechtbank stays the proceedings until final judgment is delivered in this action.

Decision

[Questions referred for a preliminary ruling and stay of proceedings] ...

[Closing formula] ... **[Or. 5]** ...

Remedy

No appeal lies against this interim judgment as yet. An appeal may be lodged against this interim judgment at the same time as an appeal against the (possible) final judgment in this case.