

Case C-233/20

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 June 2020

Referring court:

Oberster Gerichtshof (Austria)

Date of the decision to refer:

29 April 2020

Applicant and appellant in the appeal on a point of law:

WD

Defendant and respondent in the appeal on a point of law:

job-medium GmbH in liquidation

Subject matter of the main proceedings

Action for payment of an allowance in lieu of annual leave of EUR 322.06 plus interest

Subject matter and legal basis of the reference

Interpretation of EU law, in particular Directive 2003/88/EC, Charter of Fundamental Rights, Article 267 TFEU

Questions referred for a preliminary ruling

I.1 Is a provision of national law under which no allowance in lieu of annual leave is payable in respect of the current (last) working year, where the worker unilaterally terminates ('withdraws from') the employment relationship early without cause, compatible with Article 31(2) of the Charter of Fundamental Rights of the European Union (2010/C 83/02) and Article 7 of the Working Time Directive (Directive 2003/88/EC)?

1.2. If the answer to that question is in the negative:

1.2.1. Is it necessary to verify additionally if the worker was unable to use up his annual leave?

1.2.2. If so, what are the criteria for that verification?

Provisions of Community law cited

Charter of Fundamental Rights of the European Union, in particular Article 31

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 ('Directive 2003/88'), in particular Article 7

Provisions of national law cited

Urlaubsgesetz (Law on Annual Leave), BGBl 1976/390, in particular Paragraphs 2, 4, 7, 10, 12

Brief summary of the facts and procedure

- 1 The applicant was employed by the defendant from 25 June 2018 to 9 October 2018. On 9 October 2018, he terminated the employment relationship through unjustified early withdrawal. The right to annual leave acquired for the period of employment was 7.33 working days, of which he had taken four days. Therefore, he had 3.33 working days of remaining annual leave on the date that the employment relationship ended. The defendant, citing Paragraph 10(2) of the Law on Annual Leave, under which no allowance in lieu of annual leave is payable in the event of unjustified withdrawal on the part of the worker, did not pay the applicant any allowance in lieu of annual leave.
- 2 The court of first instance dismissed the action. The reasons it gave for that judgment were, essentially, that it cannot be inferred from Article 7(2) of Directive 2003/88 that a worker has a right to an allowance in lieu of annual leave irrespective of how the employment relationship employment is terminated. Any such approach would be disproportionate. It would have an unreasonable adverse impact on the employer. In the event of unjustified early withdrawal on the part of the worker, since the employment relationship ends immediately, the employer can no longer ensure that the worker uses up his right to annual leave and put him in a position actually to exercise that right. The restriction on the right in Paragraph 10(2) of the Law on Annual Leave, under which no allowance in lieu of annual leave is payable in the event of unjustified withdrawal on the part of the worker, is a practice adopted in the Austrian legal system for the purposes of Article 7(1) of Directive 2003/88.

- 3 The appeal court upheld that decision. It held that it does not follow from the case-law of the Court of Justice of the European Union that the loss of the right to an allowance in lieu of annual leave where the employment relationship is terminated through withdrawal on the part of the worker without cause, as enacted in Paragraph 10(2) of the Law on Annual Leave, is contrary to Article 7(2) of Directive 2003/88 and Article 31(2) of the Charter. On the one hand, the Court pointed out in more recent case-law that Article 7(2) of Directive 2003/88 lays down no condition for entitlement to an allowance in lieu other than that relating to the fact, first, that the employment relationship has ended and, second, that the worker has not taken all annual leave to which he was entitled on the date that that relationship ended. The Court also found that the reason that the employment relationship ended does not affect the right to an allowance in lieu. On the other hand, the Court has not yet addressed a situation in which the employment relationship was terminated through unjustified early withdrawal on the part of the worker.
- 4 According to the appeal court, termination of an employment relationship with a right to remaining annual leave is not in fact the only condition for the right to compensation. The Court has ruled that a worker released from work on full pay prior to entry into retirement has no right to compensation for that period of time. In *Kreuziger* and *MPG*, the Court held explicitly that it cannot be inferred from its case-law that the worker is still entitled to an allowance ‘irrespective of the circumstances underlying the worker’s failure to take paid annual leave’. Article 7 of Directive 2003/88 does not preclude ‘national legislation which lays down conditions for the ... right to paid annual leave, including even the loss of that right ...’, provided, however, that the worker who has lost his right to paid annual leave has actually had the opportunity to exercise the right’. This is in keeping with those judgments in which, referring to the fact that the onset of incapacity to work due to illness cannot be foreseen, the Court has admitted the right to compensation where annual leave could not be used up on account of that illness, but denied any such right where the leave could not be used up because the worker had been released from work.
- 5 According to the appeal court, the Court had established a more refined system in *Kreuziger* and *MPG*. That system was based initially on the classification of the worker’s right to paid annual leave as an important principle of EU social law. The right to annual leave seeks to enable workers both to rest from carrying out the work they are required to do under their contracts of employment and to enjoy a period of relaxation and leisure. That is incompatible with the introduction of any incentive not to take leave or encouraging workers not to take leave. The right to compensation at the end of the employment relationship might be one such incentive for workers.
- 6 The employer is required to ensure, specifically and transparently, that the worker is actually given the opportunity to take the paid annual leave to which he is entitled. To that end, the employer must encourage the worker, formally, if need be, and in accordance with the standards developed by the Court, to use up his

annual leave, while informing him, accurately and in good time, that if it will be lost otherwise. The burden of proof that it exercised all due diligence in that respect falls on the employer. If the employer exercised the due diligence required of it but the worker deliberately did not use up his annual leave, Article 7 of Directive 2003/88 does not preclude the loss of an allowance in lieu of annual leave not taken.

- 7 The employer is always able to exercise due diligence where it can foresee when the employment relationship or reference period will end, for example in the case of entry into retirement (*King, Maschek*) or expiry of a fixed term (*MPG*), as well as where the employment relationship is terminated, whether by the employer or the worker, subject to a period of (commensurately long) notice. If the employer cannot foresee when the employment relationship will end, it has limited opportunity to encourage the worker actually to exercise his right to annual leave. As, according to Paragraph 4(3) of the Law on Annual Leave, a minimum of six working days must be taken where the annual leave is taken in parts, the employer has no opportunity for effective encouragement where less annual leave remains.
- 8 According to the appeal court, precisely in the event that the worker withdraws without cause, the employer is not able to foresee the end of the employment relationship. Therefore, as a rule, it cannot be accused of any failure to exercise due diligence. Conversely, the worker is responsible for any unlawful conduct and, already pursuant to the general principles of law, he cannot derive any right from such conduct. The purpose of Paragraph 10(2) of the Law on Annual Leave is also to prevent workers from acting unlawfully. In any event, an employer cannot be criticised for failing to provide the worker (preventively) with information on the consequences of his unlawful conduct. Moreover, the right to an allowance in lieu of annual leave even in the event of early withdrawal without cause is liable to encourage workers to refrain deliberately from taking annual leave and subsequently to withdraw from the employment relationship without cause in order to deny the employer the opportunity to demand that the worker use up his annual leave and thereby to increase his remuneration upon termination. This would conflict with the purpose of annual leave. It is true that the employer is unable to foresee that the employment relationship terminates also in the event of the worker's death. However, that is not the same as unjustified withdrawal, as it is an imponderable event that is beyond the control of both the worker and the employer.
- 9 The Supreme Court has to rule on the applicant's appeal on a point of law against the judgment of the appeal court upholding the judgment delivered at first instance.

Principal arguments of the parties to the main proceedings

- 10 By his action, the applicant seeks payment of an allowance in lieu of annual leave of EUR 322.06 plus interest. The applicant himself puts forward that he

terminated the employment relationship through unjustified early withdrawal. At the hearing, he argued that Paragraph 10(2) of the Law on Annual Leave, under which no allowance in lieu (of annual leave) is payable if the worker withdraws early from the employment relationship without cause ('unjustified withdrawal' or 'withdrawal without cause'), infringes Article 31(2) of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 7 of Directive 2003/88/EC and therefore does not apply.

- 11 The defendant contends, with reference to Paragraph 10(2) of the Law on Annual Leave, that the action should be dismissed and that that provision does not conflict with EU law.

Brief summary of the basis for the reference

Observations on the Law on Annual Leave:

- 12 Under Paragraph 10(1) of the Law on Annual Leave, any annual leave not taken on the date that the employment relationship ended is to be compensated by an allowance in lieu of the leave corresponding to the period of employment in that leave year compared to the full leave year. Paragraph 10(2) of the Law on Annual Leave lays down an exception where the worker withdraws early without cause and therefore terminates the employment relationship.
- 13 'Withdrawal' is the early termination of the employment relationship by means of a unilateral declaration of intent by the worker which must be received (but, as it is unilateral, need not be accepted). Where the worker has cause for withdrawal, it is referred to as justified withdrawal (with cause); otherwise, it is referred to as unjustified withdrawal (without cause). One important example of cause for withdrawal is where the worker cannot continue to work without damaging his health or where the employer is guilty of violence, acts that offend public morality, or serious defamation of the worker or his relatives. Generally speaking, cause exists where, at the time of withdrawal, the worker cannot reasonably be expected to maintain the employment relationship, not even for the period of notice. The employment relationship is then also terminated through withdrawal where withdrawal was unjustified. However, a worker who withdraws without justification is in breach of his contract with the employer.
- 14 According to Paragraph 10(2) of the Law on Annual Leave, only unjustified withdrawal results in the loss of the allowance in lieu of annual leave provided for in Paragraph 10(1) of the Law on Annual Leave.
- 15 Paragraph 10(2) of the Law on Annual Leave is a punitive provision. It is intended to discourage workers from terminating their contracts early without justification by removing their right to an allowance in lieu of annual leave should they do so. The fact that an employer which loses a worker through unjustified withdrawal on the part of the worker need not compensate him for any (part of the) annual leave

not taken in the current year is simply a reflex effect. It provides the employer with a degree of financial relief in the event of unjustified withdrawal, which will put the employer in an unexpected, and hence incalculable, situation often to its detriment.

The position under EU law

- 16 Under Article 31 of the Charter, the right of every worker to paid annual leave is one of the fundamental rights of the European Union and it is legislated in greater detail in Article 7 of Directive 2003/88. Directive 2003/88 treats entitlement to annual leave and to payment on that account as being two aspects of a single right. It also governs the right to an allowance in lieu of annual leave not taken on the date that the employment relationship ended.
- 17 The Court expressly noted in the judgment in Case C-341/15, *Maschek v Stadt Wien* that ‘Article 7(2) of Directive 2003/88, as interpreted by the Court, lays down no condition for entitlement to an allowance in lieu other than that relating to the fact, first, that the employment relationship has ended and, second, that the worker has not taken all annual leave to which he was entitled on the date that that relationship ended’ (paragraph 27).
- 18 The Court concluded from this that ‘it follows, in accordance with Article 7(2) of Directive 2003/88, that a worker who has not been able to take all his entitlement to paid annual leave before his employment relationship has ended, is entitled to an allowance in lieu of paid annual leave not taken’. The Court further expressly noted that, in that respect, the reason for which the employment relationship has ended is not relevant (paragraph 28), from which it concluded that ‘the fact that a worker terminates, at his own request, his employment relationship has no bearing on his entitlement to receive, where appropriate, an allowance in lieu of paid annual leave which he has not been able to use up before the end of his employment relationship’ (paragraph 29).
- 19 According to the judgment of the Court in Case C-619/16, *Kreuziger v Land Berlin*, ‘it cannot be inferred from the Court’s case-law ... that Article 7 of Directive 2003/88 should be interpreted as meaning that, irrespective of the circumstances underlying the worker’s failure to take paid annual leave, that worker should still be entitled to the right to annual leave referred to in Article 7(1), and, in the event of the termination of the employment relationship, to an allowance by way of substitution therefor, pursuant to Article 7(2)’ (paragraph 37). The Court in that judgment held that ‘Article 7 of Directive 2003/88 must be interpreted as precluding national legislation ... in so far as it entails that, in the event that the worker did not ask to exercise his right to paid annual leave prior to the termination of the employment relationship, that worker loses — automatically and without prior verification of whether the employer had in fact enabled him, in particular through the provision of sufficient information, to exercise his right to leave prior to the termination of that relationship — the days of paid annual leave to which he was entitled under EU law on the date that

that relationship ended, and, accordingly, his right to an allowance in lieu of paid annual leave not taken' (paragraph 56).

- 20 According to the judgment of the Court in Case C-684/16, *Max-Planck-Gesellschaft v Tetsuji Shimizu*, 'any interpretation of Article 7 of Directive 2003/88 which is liable to encourage the worker to refrain deliberately from taking his paid annual leave during the applicable authorised reference or carry-over periods in order to increase his remuneration upon the termination of the employment relationship is ... incompatible with the objectives pursued by the introduction of the right to paid annual leave' (paragraph 48).
- 21 In its judgment in Case 8 ObA62/18b, the Supreme Court found, with reference to several judgments of the Court (*Kreuziger v Land Berlin*, C-619/16, paragraphs 41 and 42; *Max-Planck-Gesellschaft v Tetsuji Shimizu*, C-684/16, paragraph 35; and *Schultz-Hoff v Deutsche Rentenversicherung*, C-350/06 and C-520/06, paragraph 43), that national legislation which attaches 'terms' to the right to paid annual leave conferred under Directive 2003/88 that include the loss of that right at the end of a reference or carry-over period is not precluded and may be regarded as permissible, provided the worker actually had the opportunity to exercise his right up to that point.
- 22 If a provision of national law cannot be interpreted in keeping with Article 7 of Directive 2003/88 and Article 31(2) of the Charter, a national court hearing a dispute must disregard that provision of national law and ensure that the worker receives an allowance in lieu of annual leave not taken.

Reasons for the questions referred:

- 23 The Court has not yet held whether (and, if so, on what conditions) a worker who unilaterally terminates his employment relationship early without cause, thus in breach of his contract ('unjustified withdrawal'), has a right under EU law to an allowance in lieu of annual leave not taken. Under Austrian law (Paragraph 10(2) of the Law on Annual Leave), a worker in that situation has no right to an allowance in lieu of annual leave not taken in the current leave year.
- 24 In terms of the conformity with EU law of Paragraph 10(2) of the Law on Annual Leave, the various schools of thought in Austria can be summarised as follows:
- (a) Mair argues that Paragraph 10(2) of the Law on Annual Leave conflicts with the Court's findings in *Maschek*. According to Mair, the Court unequivocally noted that the only condition for entitlement to an allowance in lieu of annual leave not taken provided for in Article 7(2) of the Working Time Directive is the fact that the employment relationship has ended and the worker has not taken all the annual leave to which he was entitled *in natura*. The way in which the employment relationship ended has no bearing on that entitlement. He notes that, however, as Paragraph 10(2) of the Law on Annual Leave lays down as a condition for entitlement to an allowance in lieu of annual leave that the

employment relationship may not end in a particular way, namely through unjustified early withdrawal on the part of the worker, that provision infringes Article 7(2) of the Working Time Directive.

(b) Mayr/Erlar refer to the Court's case-law that the way in which the employment relationship ended is not relevant. In their opinion, it necessarily follows from this that the loss of the allowance in lieu of annual leave in the event of unjustified withdrawal infringes Article 7(2) of Directive 2003/88/EC. They conclude that an allowance in lieu of annual leave is payable even in the event of unjustified withdrawal, as Paragraph 10(2) of the Law on Annual Leave must be disregarded, especially since, according to the Court's case-law, Article 31(2) of the Charter – on which Article 7 of the Directive is modelled – takes precedence.

(c) Erlar took the same view in a previous paper in which, however, he noted that failure to comply with EU law should be limited to the four weeks' minimum annual leave entitlement provided for in EU law.

(d) Reissner considers that Paragraph 10(2) of the Law on Annual Leave gives cause for concern under EU law as, according to the Court, it follows from Article 7(2) of Directive 2003/88 that workers have a right to compensation for annual leave not taken irrespective of how the employment relationship ended.

(e) Auer-Mayer likewise contends that Paragraph 10(2) of the Law on Annual Leave is 'problematic under EU law', as the Court has expressly found that, as regards the entitlement to an allowance in lieu of annual leave, the reason for which the employment relationship has ended is not relevant.

(f) By contrast, Ludvik considers that Article 7 of Directive 2003/88 does not preclude national legislation providing for the loss of the right to an allowance in lieu, provided the worker had the opportunity to exercise the right conferred under the directive. Ultimately it does not follow from Article 7 of Directive 2003/88, according to the Court, that that provision should be interpreted as meaning 'that, irrespective of the circumstances underlying the worker's failure to take paid annual leave, that worker should still be entitled to the right to annual leave referred to in Article 7(1), and, in the event of the termination of the employment relationship, to an allowance by way of substitution therefor, pursuant to Article 7(2)' (*Kreuziger v Land Berlin*, C-619/16, paragraph 37). It is therefore possible, in conjunction with the derogations provided for by the various Member States, to modify the right to leave/an allowance in lieu, within certain limits, to the worker's detriment. In the event of early and unjustified withdrawal on the part of the worker, termination takes immediate effect and it is no longer possible to use up remaining leave. Therefore, the loss of any allowance in lieu of annual leave not taken is permissible. Paragraph 10(2) of the Law on Annual Leave is not inconsistent with the Court's case-law. The loss of the right to an allowance in lieu of annual leave under Paragraph 10(2) of the Law on Annual Leave is of a punitive nature. However, it only applies where the worker terminates the employment relationship early without cause. If the right to an allowance in lieu

were not lost, situations could arise in which a worker need not expect any form of penalty. But according to the Court's case-law, any interpretation of Article 7 of Directive 2003/88 which is liable to encourage the worker to refrain deliberately from taking his paid annual leave in order to increase his remuneration upon termination of the employment relationship is incompatible with the objectives pursued by the introduction of the right to paid annual leave.

Considerations

- 25 On the one hand, the Court has noted that Article 7(2) of Directive 2003/88 lays down no condition for entitlement to an allowance in lieu other than that relating to the fact, first, that the employment relationship has ended and, second, that the worker has not taken all annual leave to which he was entitled on the date that that relationship ended (*Maschek v Magistratsdirektion der Stadt Wien*, C-341/15, paragraph 27). On the other hand, it has ruled that it cannot be inferred from its case-law that Article 7 of Directive 2003/88 should be interpreted as meaning that, irrespective of the circumstances underlying the worker's failure to take paid annual leave, that worker should still be entitled to the right to annual leave referred to in Article 7(1), and, in the event of the termination of the employment relationship, to an allowance by way of substitution therefor, pursuant to Article 7(2) (*Kreuziger v Land Berlin*, C-619/16, paragraph 37). The Court also took into consideration whether the employer had put the worker in a position to use up his leave, for example through the provision of sufficient information (*Kreuziger v Land Berlin*, C-619/16, paragraph 56). Furthermore, according to the Court, any interpretation of Article 7 of Directive 2003/88 which is liable to encourage the worker to refrain deliberately from taking his paid annual leave during the applicable authorised reference or carry-over periods in order to increase his remuneration upon the termination of the employment relationship is incompatible with the objectives pursued by the introduction of the right to paid annual leave (*Max-Planck-Gesellschaft v Tetsuji Shimizu*, C-684/16, paragraph 48).
- 26 A worker's unjustified withdrawal from the employment relationship typically occurs suddenly and unexpectedly for the employer. Contrary to all other cases in which the employment relationship ends, a worker who withdraws without justification deprives himself of the opportunity to use up his annual leave *in natura*. It is only in the event of unjustified withdrawal on the part of the worker that the employment relationship is terminated with the worker being also in breach of contract. Prior to withdrawal, the worker only has a right to (paid) annual leave *in natura*. Were he to acquire a right to an allowance in lieu of annual leave by terminating the employment relationship through unjustified withdrawal, that would infringe the general principle of law that no-one should acquire a claim through unlawful action. Ultimately, the idea that the primary function of paid annual leave is to maintain the worker's health would be flouted if a worker could obtain an allowance in lieu of his right to annual leave as a result of withdrawing without justification. Thus, the main question referred to the Court

aims to establish whether or not Paragraph 10(2) of the Law on Annual Leave *in toto* gives cause for concern with EU law.

- 27 If the Court answers the main question in the negative, the question arises as to whether and how the employer should put the worker in a situation to use up his annual leave, as required by the Court, where the worker withdraws unexpectedly, for the employer, and without justification. Account would also have to be taken of the fact that a worker who withdraws without justification has not given a period of notice during which often remaining annual leave is or can be used up.

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