Anonymised version

Case C-57/22

Request for a preliminary ruling

Date lodged:

28 January 2022

Referring court:

Nejvyšší soud České republiky (Czech Republic)

Date of decision to refer:

6 December 2021

Applicant:

YQ

Defendant:

Ředitelství silnic a dálnic ČR

[…]

ORDER

The Nejvyšší soud (The Supreme Court, Czech Republic) has ruled […] IN THE CASE OF THE APPLICANT **YQ**, […], resident in Brno [(Czech Republic)], […] v. the defendant **Ředitelství silnic a dálnic ČR**, having its registered office in Prague [(Czech Republic)] […], with respect to the payment of CZK 55,552 plus associated amounts and interest, conducted before the Městský soud v Brně (Brno City Court, Czech Republic) […], concerning the appeal on a point of law of the applicant against the decision of the Krajský soud v Brně (Regional Court, Brno) [(Czech Republic)], of 6 October 2020 […], as follows:

I. The proceedings concerning the appeal on a point of law are hereby **stayed** until the Court of Justice of the European Union renders a preliminary ruling concerning the question listed in paragraph [III] of the operative part of the decision.

II. The Supreme Court hereby **submits** the following questions to the Court of Justice of the European Union for a preliminary ruling, pursuant to Article 267 of the Treaty on the Functioning of the European Union:

III. 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 case-law by virtue of which a worker who was unlawfully dismissed then reinstated in his or her employment, in accordance with national law, following the annulment of the dismissal by a decision of a court, is not entitled to paid annual leave for the period between the date of the dismissal and that of the reinstatement in his or her employment on the ground that, during that period, that worker did not actually carry out work for the employer, also in cases when, according to national legislation, the worker who has been unlawfully dismissed and who has without undue delay informed his or her employer in writing that he or she insists on being employed, is entitled to wage or salary compensation in the amount of average earnings from the date when he or she informed the employer that he or she insists on the continuation of his or her employment until such time as the employer allows him or her to carry on in his or her work or his or her employment relationship is validly terminated?

Grounds:

I.

Background of the proceedings and proceedings before Czech courts thus far

1 The applicant was seeking payment from the defendant of CZK 55,552 plus default interest. She stated that the parties to the proceedings concluded an employment agreement on 23 June 2009, pursuant to which the applicant worked as an investment clerk for the defendant. The defendant failed to pay to the applicant salary compensation for leave in the month of July 2017 drawn on 18-21, 24-28, and 31 July, amounting to CZK 3,888, in the month of August 2017 drawn on 2, 9, 14-18, 21-25, and 28-30 August, amounting to CZK 20,832, and in the month of September 2017, drawn on 6, 11-15, 18-22, 25-27, and 29 September, amounting to CZK 20,832. The applicant was not ordered to draw outstanding leave for the period of 1 January 2014 to 10 January 2017, and consequently, the applicant announced to the defendant that she would draw leave on those days and did actually draw the leave, despite the defendant's disagreement.

2 The defendant did not recognise the applicant's claim. The defendant noted that, in the days listed in the application, the applicant's leave was not approved, and she was not entitled to leave for the period of 1 January 2014 to 10 January 2017, as she was not performing any work for the defendant due to a dispute concerning the invalidity of the termination of her employment relationship.

3 The Městský soud v Brně (City Court, Brno) denied the application by its judgment of 4 October 2019 […].

4 On the basis of the applicant's appeal, the Krajský soud v Brně (Regional Court, Brno) confirmed the first-instance judgment by its judgment of 6 October 2020 […].

5 The courts of lower instance based their decisions on the finding that the applicant was employed by the defendant in an employment relationship, received notice of termination of employment on 23 October 2013, which was determined invalid by the judgment of the Krajský soud v Brně (Regional Court, Brno) dated 20 December 2016, […] which became effective on 10 January 2017, and the applicant recommenced performing work for the defendant pursuant to the employment agreement after 10 January 2017. In that period (i.e., in the period from 1 January 2014 to 10 January 2017), no work had been assigned by the defendant to the applicant and the applicant did not perform any work for the defendant. The applicant herself determined specific days of leave in the months of July, August, and September 2017 for the years of 2014-2016 (because, as she claimed, the defendant failed to set the date of leave for her for that period by 30 June 2017), informing the defendant of the days on which leave would be drawn. On those days, the applicant did not perform work for the defendant. Subsequently, the defendant terminated the employment relationship with the applicant on 9 August 2017, by notice of termination given pursuant to Paragraph 52(g) of the Labour Code, due to impermissible absence on 18 to 31 July 2017; the validity of the notice is the subject of a judicial dispute between the parties conducted before the Městský soud v Brně (City Court, Brno) […], which is still pending.

5. The applicant lodged an appeal on a point of law against the judgment of the appeal court. In the judicial proceedings, the applicant submitted for consideration case-law of the Court of Justice of the European Union ('CJ', 'CJEU', or 'Court of Justice') and the legal question whether Article 7 of Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time be interpreted as precluding national legislation, in that a claim to paid leave be conditional on time actually worked and that, for the claim, the time for which the employee did not work, due to not being assigned work by the employer during a dispute concerning termination invalidity, not be recognised. In her interpretation of Article 7 of the Directive, the applicant repeatedly pointed to CJ case-law (CJ C-282/10 of 24 January 2012, CJ C-178/15 of 30 June 2016, CJ C-214/16 of 29 November 2017, [CJ] C-173/99 of 26 June 2001, and most recently CJ of 25 June 2020 in Cases C-762/18 and C-37/19), asked the courts to present a preliminary ruling in the specific case, which, [however], did not take the applicant's submission or her argumentation into account. The applicant considers that an interpretation of the national laws within the meaning and purpose of the Directive is necessary, due to the non-limitation and inalienability of each worker's right to paid annual leave. National legislation must be interpreted in light of European laws, such that, if work was not assigned to her in line with the employment agreement unquestionably for grounds on the employer's part, this (failure to) work on the part of the employee must always be considered to be an obstacle to work created

on the part of the employer. Wage or salary compensation pursuant to Paragraph 69 of the Labour Code cannot, however, in and of itself, cover both indemnification of the damage incurred by the employee due to the unlawful actions of the employer and the right of each employee to paid annual leave, within the meaning and purpose of the Directive. During the appeal proceedings, the Court of Justice rendered an opinion on the resolution of the legal issue submitted (in the judgment of 25 June 2020 in Cases C-762/18 and C-37/19), concerning similar facts to those in the case under review.

II.

Applicable national law

6 The case under review must be, even now – given that the applicant is claiming compensation for leave which she should have drawn in the months of July, August, and September 2017 – considered pursuant to Act 262/2006, zákoník práce (the Labour Code), as amended as at 31 October 2017 […] ("Labour Code") – subsequently, significant amendments have been made in the legal regulation of the right to leave, which do not, however, concern the case under review.

7 *Pursuant to the provisions of Paragraph 213(1) of the Labour Code, the length of annual leave shall be at least 4 weeks in a calendar year.*

Pursuant to the provisions of Paragraph 218(3) of the Labour Code, where the drawing of leave is not determined by 30 June of the subsequent calendar year, the employee shall also be entitled to determine the drawing of the leave. The employee shall inform the employer of the drawing of the leave at least 14 days in advance, unless he agrees with the employer on another notification period.

Pursuant to the provisions of Paragraph 222(1) of the Labour Code, an employee shall be entitled to wage or salary compensation in the amount of his average earnings for the time during which leave is drawn. To the employees listed in Paragraph 213(4), such wage or salary compensation may be provided in the amount of his average earnings corresponding to the average length of his shift.

Pursuant to the provisions of Paragraph 69(1) of the Labour Code, if the employer has given an invalid notice of termination to the employee, or if the employer has invalidly cancelled the employee's employment relationship with immediate effect or during the trial period, and provided that the employee has informed the employer without undue delay in writing that he insists on his employment being continued, his employment relationship carries on and the employer shall provide the employee with wage or salary compensation. Compensation pursuant to sentence one is due to the employee as the amount of his average earnings from the day on which the employee informed the employer that he insists on further employment until such time as the employer enables him to carry on in his work or until the employment relationship is terminated validly.

Pursuant to the provisions of Paragraph 69(2) of the Labour Code, should the total period for which an employee should be entitled to wage or salary compensation exceed 6 months, a court may, at the employer's request, adequately reduce the employer's obligation to provide wage or salary compensation for any additional period; in its decision, the court shall in particular take into account whether the employee was employed elsewhere during that time, the type of work performed there, the amount of earnings attained, or the reason why he did not take up work.

III.

Applicable European Union legislation

8 This legislation is 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 ("EC Directive").

9 *Pursuant to Article 7(1) of EC Directive, Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks, in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.*

Pursuant to Article 7(2) of EC Directive, the minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.

IV.

Grounds for the preliminary reference

10 Standard case-law in the Czech Republic – applicable to the question of the regime governing legal relations of a worker (in Czech law the term is 'employee', and therefore we will continue to use the term 'employee' when quoting case-law of the Czech Republic) with an employer in the event of employment termination by the employer with which the employee has shown disagreement, asks the employer to assign work to him or her, and files (in a timely manner) an application for the determination of the invalidity of termination – has concluded that these legal relations cannot be governed by an employment agreement, collective agreement, internal regulation, and applicable employment regulations, in the same form as if the employment had continued unquestionably. The employment relationship between an employee and the employer shall, in the said period, be governed by special legal regulation set out in Paragraphs 69-72 of the Labour Code; in the said period, therefore, the employee shall entitled neither to wage or salary compensation in the event of obstacles to work pursuant to Paragraph 199 of the Labour Code, nor to wage or salary compensation for undrawn leave pursuant to Paragraph 222(2) and (4) of the Labour Code (comp. conclusions of the judgment of the Nejvyšší soud (Supreme Court) of 17 August 2017, file No. 21 Cdo 5097/2016,

ECLI:NS:2017:21.CDO.5097.2016.1, or judgment of the Nejvyšší soud (Supreme Court) of 30 March 2004, file No. 21 Cdo 2343/2003, ECLI:NS:2004:21.CD0.2343.2003.1).

11 Where employment termination was found invalid and the employee requested continuation of employment, standard case-law in the Czech Republic takes the position that, in that case, the employee shall be in principle entitled to wage or salary compensation (in the amount of his or her average earnings) for the entire period for which a court dispute concerning employment termination was pending, i.e., for the period from the day on which the employee requested continuation of employment until the effective date of the judgment determining the invalidity of employment termination (unless the employer makes it possible for the employee to carry on in his or her work at an earlier date or unless the employment relationship is validly terminated earlier); after the expiry of six months from the entire period in respect of which wage compensation is to be provided to the employee, the punitive and satisfactory nature of the wage (salary) compensation recedes to the background and, on the other hand, its social function is emphasised. The main question is whether the employee's behaviour in securing additional earnings (another income) is correct; a court may reduce wage compensation pursuant to the provisions of Paragraph 61(2) of the Labour Code (now Paragraph 69(2) of the Labour Code) only if it can be inferred, following an evaluation of all circumstances of the case, that the employee engaged or could have engaged (and failed to without serious grounds) in work for another employer, subject to conditions substantially comparable or even more advantageous than he or she would have in the performance of work pursuant to the employment agreement, had the employer fulfilled its obligation to assign the agreed work to him or her. The same applies if the employee commences business activity after invalid employment termination (comp. grounds of judgment of the Nejvyšší soud (Supreme Court) of 13 September 2002, file No. 21 Cdo 1746/2001, ECLI:CZ:NS:2002:21.CDO.1746.2001.1, and Opinion of the Nejvyšší soud (Supreme Court) of 9 June 2004, file No. Cpjn 4/2004, ECLI:CZ:NS:2004:CPJN.4.2004.1).

12 Furthermore, it has been inferred by settled case-law that an employee is entitled to be provided, in addition to wage (salary) compensation pursuant to the provisions of Paragraph 69(1) of the Labour Code, with compensation for damages incurred as a result of a breach of a legal obligation by the employer, such as various benefits provided in addition to wages (e.g., meal vouchers). Hence, an employee is, due to the employer's liability for damages, entitled to compensation for any pecuniary loss which does not consist of loss of earnings (comp. grounds of Judgment of 15 July 2010, file No. 21 Cdo 1000/2009, ECLI:NS:2010:21.CDO. 1000.2009.1).

13 It is evident from the overview given above that case-law in the Czech Republic clearly tends to apply the principle that, in the case of unlawful employment termination by the employer, the employee must be indemnified for any and all harm incurred by him or her in order to attain (at least in term of the pecuniary

compensation) a situation as if the employment had carried on even at the time of the dispute concerning the validity of employment termination, and in principle throughout the entire duration of the dispute (except when the cause of which – as was emphasised above – lies on the employee's part).

14 If, however, the employee does not perform any work for the employer during the dispute concerning the validity of employment termination (even if this were due to the employer's unlawful steps), and if the employee also is not performing any work for the employer at the time of drawing leave (albeit, naturally, due to an entirely legitimate procedure) and if, in both cases, the employee receives – in the former case in the regime established by Paragraph 69(1) of the Labour Code, in the latter case in the regime established by Paragraph 222(1) of the Labour Code – full wage (salary) compensation, the only difference is the formal grounds for the compensation (in practice, however, that difference is minimal).

15 In relation to the conclusions stated in paragraph 10 of this application, however, the Ústavní soud (Constitutional Court) in its decision of 10 December 2020, file No. II. ÚS 2522/19, pointed to their potential inconsistency with the interpretation of Article 7 of EC Directive by the Court of Justice of the European Union (comp. paragraph 56 of the decision), in particular to the legal opinion expressed in CJEU judgments in 'Case C-282/10' and in 'Joined Cases C-762/18 and C-37/19'.

16 The Court of Justice concluded that *"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 must be interpreted as precluding national case-law by virtue of which a worker who was unlawfully dismissed and then reinstated in his or her employment, in accordance with national law, following the annulment of the dismissal by a decision of a court, is not entitled to paid annual leave for the period between the date of the dismissal and that of the reinstatement in his or her employment, on the ground that, during that period, that worker did not actually carry out work for the employer"* (judgment of 25 June 2020, in Joined Cases C-762/18 and C-37/19, *QH* v *Varhoven kasatsionen sad na Republika Bulgaria and CV v Iccrea Banca SpA* – 'the judgment').

17 This conclusion was, however, made against the background of legal regulation of the right to wage compensation in the case of 'unlawful dismissal from employment' in the Labour Code of the Republic of Bulgaria (comp. paragraphs 5 – 8 of the judgment), which is, however, principally different from the legal regulation (and case-law) of the Czech Republic.

18 The fundamental difference between the two set of legal regulation lies in that, whereas the Bulgarian legal regulation stipulates in the case of unlawful dismissal a right for the employee to the payment of gross remuneration for work for a period of (only) six months and (only) in the amount of the difference between the remuneration that the employee achieved in the period in question in another employment relationship and that attained in the employment relationship from which he or she was unlawfully dismissed, the Czech legal regulation (in

principle) grants this right in full and for the entire period (with the exceptions given above).

19 In the context of the legal regulation and case-law of the Czech Republic, unconditional application of the conclusions reached in the above-mentioned judgment of the Court of Justice would result in significant imbalance between the fundamental principles upon which the employment law of the Czech Republic is based (Paragraph la(1) of the Labour Code), namely between the principle of 'special legal protection of the position of an employee', which is fully complied with by the compensation of all harm incurred by the employee due to unlawful dismissal by the employer (i.e., including any 'harm' that the employee may have hypothetically incurred by not being able to "exercise his or her statutory right to leave" during the dispute concerning the validity of dismissal) and the principle of 'due performance of work by the employee in accordance with the employer's legitimate interests', which is infringed by the fact that an employee who has started to perform work for the employer draws (may draw) leave to an extent to which he is not entitled under legal regulation or agreement with the employer in that calendar year.

20 After all, the Court of Justice has itself recognised the possibility of departing from the conclusion in the judgment referred to above (paragraphs 79 and 80).

21 The Nejvyšší soud (Supreme Court) holds that, for the reasons given above, the preliminary reference cannot be considered *acte clair* or *acte éclairé*. The Nejvyšší soud (Supreme Court), as a court against whose decisions there is no judicial remedy pursuant to Article 267 of the Treaty on the Functioning of the European Union, therefore deems it necessary to make this preliminary reference to the Court of Justice.

V.

Staying of proceedings

22 Having regard to the submission of questions for a preliminary ruling, the Nejvyšší soud (Supreme Court) has stayed […] [procedural particulars pursuant to national law] the proceedings in the case pending the decision of the Court of Justice of the European Union, since the proceedings cannot continue without a response thereto.

[…] [procedural particulars pursuant to national law]

Brno, 6 December 2021

[…]

[…] [signature]

[…] [procedural particulars pursuant to national law]