

Case C-514/20

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:

13 October 2020

Referring court:

Bundesarbeitsgericht (Germany)

Date of the decision to refer:

17 June 2020

Applicant, appellant and appellant on a point of law:

DS

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

Koch Personaldienstleistungen GmbH

Subject matter of the main proceedings

Entitlement to overtime pay when taking minimum annual leave

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Question referred for a preliminary ruling

Do Article 31(2) of the Charter of Fundamental Rights of the European Union and Article 7 of Directive 2003/88/EC preclude a provision in a collective labour agreement which, for the purpose of calculating whether an employee is entitled to overtime pay and for how many hours, takes account only of the hours actually worked and not also of the hours during which the employee takes his paid minimum annual leave?

Provisions of EU law cited

Charter of Fundamental Rights of the European Union ('the Charter'), 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 (OJ 2003 L 299, p. 9)

Provisions of national law cited

Mindesturlaubsgesetz für Arbeitnehmer (Federal law on minimum leave for workers; 'the Bundesurlaubsgesetz' or 'BUrlG'), Paragraphs 1, 3, and 13

Manteltarifvertrag für die Zeitarbeit (Framework Collective Agreement for temporary employment; 'MTV') in the version of 17 September 2013, Paragraphs 3, 4, and 6a

Summary of the facts and proceedings

- 1 The applicant is a temporary worker and is employed by the defendant on a full-time basis for a gross hourly wage of EUR 12.18. The defendant runs an employment agency. The employment contract between the parties is governed by the MTV.
- 2 In accordance with Paragraph 3.1.1 of the MTV, the regular monthly working hours for a full-time employee are 151.67 hours. This equates to an average of 35 hours per week. In order to calculate the regular working hours for a given month, the number of working days is multiplied by seven hours in accordance with Paragraph 3.1.2 of the MTV. For part-time employment, the regular working hours per month are calculated pro rata.
- 3 Working hours in excess of the regular monthly working hours are regarded as 'overtime' in accordance with Paragraph 4.1.1 of the MTV. A higher hourly wage rate is paid for overtime above a certain threshold in accordance with Paragraph 4.1.2 of the MTV. To calculate this threshold, the number of working days is multiplied by eight hours, which, according to the wording of this provision, depends on the hours 'worked'. Furthermore, it emerges from Paragraph 4.1.2 of the MTV that the additional allowance for overtime is 25% and that these provisions apply 'equally' to part-time employees.
- 4 In the month of August 2017, which included 23 working days (161 regular working hours), the applicant worked 121.75 hours and took minimum annual leave within the meaning of Article 31(2) of the Charter and Article 7(1) of Directive 2003/88. The defendant deducted ten annual leave days amounting to 84.7 hours for August 2017; in doing so, it applied Paragraph 6a of the MTV, in

accordance with which the average working hours during the three months prior to taking leave are used for the purpose of calculating holiday pay.

- 5 In accordance with Paragraph 4.1.2 of the MTV, overtime pay should have been paid for hours in August 2017 that exceeded the 184 hours worked.
- 6 The applicant holds the view that the hours deducted for leave should have been included when calculating overtime pay. The calculation should therefore be based on a total of 206.45 hours worked for August 2017. This means that the threshold of 184 worked hours was exceeded, with the result that he is entitled to overtime pay.
- 7 The applicant requests that the defendant be ordered to pay him EUR 72.32 gross plus interest on arrears.
- 8 The defendant submits that, according to the wording of the MTV, only hours actually worked should be included when calculating overtime pay; on the other hand, leave should not be taken into account. It claims that the applicant is not entitled to overtime pay because he did not work more than 184 hours in August 2017.
- 9 The action was dismissed by the lower courts. The applicant continues to seek the same form of order for payment by way of the appeal on a point of law admitted by the referring court.

Brief summary of the grounds for the reference

Assessment of the case on the basis of national law

- 10 In the course of interpreting Paragraph 4.1.2 of the MTV, the referring court reached the conclusion that the applicant has no entitlement to overtime pay for August 2017.
- 11 This is initially evident from the wording of that provision. According to general language use, the term ‘worked hours’ is understood to mean hours in which work is actually carried out.
- 12 The outcome is the same if a teleological interpretation is applied. The referring court assumes that the purpose of the overtime pay provided for in the MTV is to compensate for the particular work-related strain that arises once certain limits of working hours are exceeded. In principle, the purpose of such allowances could also be to protect generally the employee’s leisure time, but in the case of the MTV there is nothing to suggest that the parties to the collective labour agreement had this intention in mind. This is particularly evident from Paragraph 4.1.2. of the MTV, in accordance with which the rules relating to overtime pay apply ‘equally’ to part-time employees, with the result that these employees become entitled to overtime pay only once the same limits as for full-time employees are exceeded.

- 13 The question also arises as to whether the rules in the collective labour agreement on the calculation of overtime pay would form the basis of an improper financial incentive for employees not to take their leave. According to the case-law of the referring court, certain incentives to forego leave may contravene Paragraph 1 of the BUrlG, under which all employees are entitled to paid leave for purposes of rest. Collective labour agreements are not permitted to deviate from this provision (Paragraph 13(1)(1) of the BUrgG). If the applicant had not taken leave in August 2017, but had actually worked the hours deducted for the leave period, he would have earned an entitlement under the MTV to overtime pay for 22.45 hours of EUR 68.36 gross (22.45 hours x EUR 12.18 gross x 25%). This negative effect of leave is built into the system of the MTV. If employees initially work overtime and then take leave in the same month, the overtime pay may be reduced or be completely cancelled out.
- 14 However, the MTV contains certain features whereby financial disadvantages as a result of taking leave occur only in particular circumstances. On the one hand, in accordance with Paragraph 4.1.2. of the MTV, payment of overtime is not required until average working hours of 40 hours per week are exceeded. The regular weekly working hours are 35 hours, however. Therefore, overtime pay does not become payable until more than eight sevenths of the regular monthly working hours have been worked within the month. On the other hand, the number of hours for which overtime pay is payable is limited by the fact that, in accordance with Paragraph 3.2.1. of the MTV, hours in excess of the regular monthly working hours must be paid into a working time account. An upper limit of 150 additional hours applies in accordance with Paragraph 3.2.2 of the MTV, which is soon reached if an employee works overtime on a frequent basis.
- 15 The overtime pay that is ‘at risk’ as a result of taking annual leave as a proportion of the total gross monthly salary is comparatively small in typical sets of circumstances. In the applicant’s case, it is about 2.7% for the month of August 2017.

Assessment of the case under EU law

- 16 In the view of the referring court, the decision in the main proceedings depends on whether Article 31(2) of the Charter and Article 7 of Directive 2003/88/EC preclude a provision such as Paragraph 4.1.2. of the MTV. The Court of Justice has previously ruled that EU law can also conflict with rules in collective labour agreements (see, among others, the judgment of 23 April 2020, *Land Niedersachsen (Previous periods of relevant activity)*, C-710/18, EU:C:2020:299, paragraph 22 et seq.).
- 17 Whether a rule such as Paragraph 4.1.2. of the MTV creates incentives for foregoing leave that are incompatible with Article 31(2) of the Charter and Article 7 of Directive 2003/88/EC is not clear from the outset (*acte clair*), nor has it been clarified by the case-law of the Court of Justice in a manner that removes all reasonable doubt (*acte éclairé*).

- 18 The case-law of the Court of Justice does indicate, on the one hand, that a contravention of these EU-law provisions may have occurred.
- 19 The Court of Justice has highlighted the special significance of the minimum period of annual leave in numerous decisions. In accordance with its case-law, every worker's right to paid annual leave must be regarded as a particularly important principle of EU social law from which there may be no derogations and the implementation of which by the competent national authorities must be confined within the limits expressly laid down by [...] Directive 2003/88 (judgments of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraph 15, and of 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 22 and the case-law cited). This principle is expressly guaranteed in Article 31(2) of the Charter, which Article 6(1) TEU recognises as having the same legal value as the Treaties (judgments of 30 June 2016, *Sobczyszyn*, C-178/15, EU:C:2016:502, paragraph 20, and of 8 November 2012, *Heimann and Toltschin*, C-229/11 and C-230/11, EU:C:2012:693, paragraph 22).
- 20 The dual purpose of the right to paid annual leave is to enable the worker to rest and to enjoy a period of relaxation and leisure (judgment of 20 July 2016, *Maschek*, C-341/15, EU:C:2016:576, paragraph 34 and the case-law cited). For this reason, a worker must not be faced with circumstances during his annual leave that are liable to give rise to uncertainty as to the remuneration owed to him (judgment of 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraph 37 et seq.).
- 21 Finally, the Court of Justice has ruled that Article 7 of Directive 2003/88 further defines the meaning of the rule in Article 31(2) of the Charter. Article 31(2) of the Charter expresses the fundamental right to paid annual leave affirmed by EU law (judgments of 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871, paragraphs 38 and 85, and of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, paragraphs 31, 74 and 75). If a national rule cannot be interpreted in a manner consistent with Article 31(2) of the Charter and Article 7 of Directive 2003/88, the national court or tribunal must disapply that national rule. This obligation on the national court arises from Article 7 of Directive 2003/88 and Article 31(2) of the Charter if a party in the legal dispute is an employer with the status of a public authority. This obligation follows from Article 31(2) of the Charter if a party in the legal dispute is an employer who is a private individual (judgments of 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871, paragraph 64 et seq., and of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, paragraph 62 et seq.).
- 22 In view of the special significance of the entitlement to paid annual leave, doubts arise as to whether disadvantages relating to the amount of overtime pay on the basis of the minimum leave taken are compatible with Article 31(2) of the Charter and Article 7 of Directive 2003/88. The Court of Justice has held that the creation

of incentives to forego minimum annual leave is not permitted. Employees must also not be encouraged to do so. This would be at variance with the objectives of the right to paid annual leave relating in particular to the need to ensure that workers enjoy a period of actual rest, with a view to ensuring effective protection of their health and safety (judgments of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, paragraph 42; of 6 November 2018, *Kreuziger*, C-619/16, EU:C:2018:872, paragraph 49; and of 6 April 2006, *Federatie Nederlandse Vakbeweging*, C-124/05, EU:C:2006:244, paragraph 32).

- 23 In the *Lock* case (judgment of 22 May 2014, C-539/12, EU:C:2014:351), the Court of Justice ruled on a set of circumstances similar to those obtaining in the present case. In addition to his basic salary, the employee received commission for concluded purchase contracts, which was paid several weeks or months after each contract in question had been concluded. While on leave, he received his basic salary. Commission for contracts concluded in the past continued to be paid. However, the employee was unable to earn new commission from concluding contracts during his leave. For this reason, his pay was reduced in the period after taking that leave.
- 24 The Court ruled that Article 7(1) of Directive 2003/88 precludes such a rule. The employee may be deterred from exercising his right to annual leave, given the financial disadvantage. This is all the more likely given that the commission represented, on average, over 60% of the remuneration. Such a reduction in a worker's remuneration in respect of his paid annual leave is contrary to the objective pursued by Article 7(1) of Directive 2003/88. The fact that the reduction in remuneration occurs after the period of annual leave is irrelevant (judgment of 22 May 2014, *Lock*, C-539/12, EU:C:2014:351, paragraph 21 et seq.).
- 25 In the *Lock* case, the disadvantages in respect of remuneration entitlements occurred more regularly and to a greater extent than in the case on which the referring court now has to rule. However, a contravention of EU law cannot be discounted merely due to the fact that the potential financial disadvantages are smaller.
- 26 On the other hand, there is case-law of the Court of Justice which suggests that the negative incentive effect of Paragraph 4.1.2 of the MTV is not sufficient to constitute a breach of Article 31(2) of the Charter and Article 7 of Directive 2003/88. Such indications can be found in the Court's rulings on normal remuneration that must continue to be paid to workers while they are taking leave (judgments of 13 December 2018, *Hein*, C-385/17, EU:C:2018:1018, paragraph 32 et seq.; of 22 May 2014, *Lock*, C-539/12, EU:C:2014:351, paragraph 16 et seq.; and of 15 September 2011, *Williams and Others*, C-155/10, EU:C:2011:588, paragraph 19 et seq.).
- 27 Remuneration in respect of annual leave must, in principle, be determined in such a way as to correspond to the normal remuneration received by the worker. Where

the remuneration received by the worker is composed of several components, the determination of that normal remuneration and the amount to which that worker is entitled during his annual leave requires a specific analysis (judgment of 15 September 2011, *Williams and Others*, C-155/10, EU:C:2011:588, paragraphs 21 and 22).

- 28 In the *Hein* case, the Court concerned itself with the question of whether the overtime worked by the employee had to be taken into account when calculating remuneration for annual leave. The Court noted that, given its exceptional and unforeseeable nature, remuneration received for overtime does not, in principle, form part of the normal remuneration that the worker may claim in respect of the paid annual leave provided for in Article 7(1) of Directive 2003/88. However, when the obligations arising from the employment contract require the worker to work overtime on a broadly regular and predictable basis, and the corresponding pay constitutes a significant element of the total remuneration that the worker receives for his professional activity, the pay received for that overtime work should be included in the normal remuneration (judgment of 13 December 2018, *Hein*, C-385/17, EU:C:2018:1018, paragraphs 46 and 47).
- 29 Whether or not it is strictly required that broadly regular and predictable overtime, for which remuneration constitutes a significant element of the total remuneration, should be included in normal remuneration, has not yet been fully clarified. The wording, to the effect that remuneration for this overtime ‘should’ be included in the calculation of remuneration in respect of annual leave (judgment of 13 December 2018, *Hein*, C-385/17, EU:C:2018:1018, paragraph 47), argues against a mandatory requirement to include overtime. However, the comparison between remuneration for unforeseeable overtime of an exceptional nature, and broadly regular and predictable overtime, the remuneration for which constitutes a significant element of overall remuneration, supports such a requirement.
- 30 There is much evidence in the present case to suggest that it concerns overtime of an exceptional and unforeseeable nature. There are no indications in the collective labour agreement nor in the details of the main proceedings to suggest that the overtime is broadly regular and predictable and that the remuneration for these hours constitutes a significant element of the total remuneration. If remuneration for such overtime is not strictly required to form part of the calculation of remuneration for annual leave, it seems likely that a comparable financial disadvantage in the calculation of overtime pay as a result of having taken annual leave does not infringe Article 31(2) of the Charter and Article 7 of Directive 2003/88.
- 31 The referring court takes the view that the Court of Justice must rule as to whether the criteria that apply to normal remuneration that must continue to be paid during the minimum period of leave can be applied to the calculation of overtime pay. The financial disadvantage of lower remuneration due to having taken annual leave exists independently of whether it results in lower remuneration for annual leave during the leave period or whether the disadvantage affects remuneration for

overtime in periods prior to or after the leave period. The financial incentive to forego annual leave is comparable in both cases.

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