

Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

13 January 2022 (*)

(Reference for a preliminary ruling – Social policy – Charter of Fundamental Rights of the European Union – Article 31(2) – Directive 2003/88/EC – Organisation of working time – Article 7 – Annual leave – Working time – Overtime – Calculation of working time on a monthly basis – No overtime pay when taking annual leave)

In Case C-514/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesarbeitsgericht (Federal Labour Court, Germany), made by decision of 17 June 2020, received at the Court on 13 October 2020, in the proceedings

DS

v

Koch Personaldienstleistungen GmbH,

THE COURT (Seventh Chamber),

composed of I. Ziemele (Rapporteur), President of the Sixth Chamber, acting as President of the Seventh Chamber, T. von Danwitz and A. Kumin, Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- DS, by R. Buschmann,
- the European Commission, by B.-R. Killmann and D. Recchia, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 31(2) of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 7 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 (OJ 2003 L 299, p. 9).
- 2 The request has been made in proceedings between DS and Koch Personaldienstleistungen GmbH ('Koch') concerning the taking into account of days of paid annual leave in the calculation of the number of hours worked giving rise to entitlement to overtime pay.

Legal context

European Union law

3 Recitals 4 and 5 of Directive 2003/88 state:

‘(4) The improvement of workers’ safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations.

(5) All workers should have adequate rest periods. ...’

4 Article 7 of that directive, entitled ‘Annual leave’, provides:

‘1. 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.

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.’

German law

5 The Manteltarifvertrag für Zeitarbeit (Framework Collective Agreement for temporary employment), in the version applicable to the facts in the main proceedings (‘the MTV’), contains, in Paragraph 3.1, concerning ‘working hours’, the following passages:

‘3.1.1. The regular monthly working hours for a full-time employee shall be 151.67 hours.

3.1.2. The regular individual monthly working hours shall depend on the number of days worked.

The monthly working hours shall be:

...

– 161 hours in a month comprising 23 working days.

...’

6 Paragraph 4.1.2 of the MTV provides:

‘The additional allowance for overtime shall be paid for hours worked in excess of:

...

– 184 hours for 23 working days.

The additional allowance for overtime shall be 25%.

...’

Facts of the main proceedings and the question referred for a preliminary ruling

7 In the month of August 2017, which included 23 working days, DS, employed by Koch as a full-time temporary worker, worked 121.75 hours during the first 13 days, then took, for the 10 remaining days, paid annual leave corresponding to 84.7 hours.

8 Taking the view that account had to be taken of the days of paid annual leave when determining the number of hours worked, DS brought an action before the German courts seeking an order requiring

Koch to pay him a supplement of 25% for 22.45 hours, that is, EUR 72.32, corresponding to the number of hours worked exceeding the threshold of 184 hours.

- 9 After his action was dismissed at first instance and on appeal, DS brought an appeal on a point of law (*Revision*) before the referring court.
- 10 The Bundesarbeitsgericht (Federal Labour Court, Germany) observes that, according to the wording of Paragraph 4.1.2 of the MTV, only hours worked can be accounted for when determining whether the worker has exceeded the threshold of the regular monthly working hours quota. The term ‘hours worked’ refers to the concept of hours actually worked, excluding periods of leave.
- 11 Furthermore, the purpose of the additional allowance for overtime is, under the MTV, to compensate for a particular work-related strain which does not occur while taking paid annual leave, so that the additional allowance is intended to reward an employee working beyond his or her contractual obligations. Thus, that additional allowance is a right which is acquired by working, but periods of leave cannot be taken into account.
- 12 The referring court states, moreover, that overtime allowances could also encourage employers not to interfere with workers’ leisure time, since such an interference gives rise to an additional cost of 25% of the contractually defined hourly wage.
- 13 However, the Bundesarbeitsgericht (Federal Labour Court) finds that the provisions of the MTV may encourage workers not to take the minimum period of paid annual leave. In the present case, if DS had worked during the hours corresponding to the paid annual leave which he took, he would have exceeded the regular working hours quota by 22.45 hours and would have been entitled for those hours to the additional allowance of 25%.
- 14 Thus, the referring court expresses doubts as to the compatibility of the system established by the MTV, in that it ultimately entails a reduction in the right to overtime pay, with the case-law of the Court according to which workers cannot be deterred from asserting their right to the minimum period of paid annual leave.
- 15 In that regard, that court considers that the case at issue in the main proceedings is relatively similar to that which gave rise to the judgment of 22 May 2014, *Lock* (C-539/12, EU:C:2014:351), in so far as, in both cases, the financial disadvantage does not concern the remuneration for annual leave itself, but arises during a period prior to or after the leave.
- 16 The referring court also recalls that, in the judgment of 13 December 2018, *Hein* (C-385/17, EU:C:2018:1018, paragraph 47), the Court held that, where 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, the pay for that overtime work should be included in the remuneration due during the period of leave.
- 17 If the case-law established in that judgment were to be applied to the case in the main proceedings, in view of the fact that, in the case in the main proceedings, overtime appears to be exceptional and unforeseeable, there would be no need to include the amount of additional pay due in respect of overtime worked in the remuneration paid during the paid annual leave. Accordingly, it is logical that days of leave should not be taken into account in determining the number of hours giving rise to entitlement to overtime pay.
- 18 Lastly, the referring court states that collective agreements may not derogate from Paragraph 1 of the Mindesturlaubsgesetz für Arbeitnehmer (Bundesurlaubsgesetz) (Law on the minimum period of leave for workers (Federal Law on leave)), according to which every worker is entitled to leave for each calendar year, and which must be interpreted in accordance with EU law, in the light of Article 31(2) of the Charter and Article 7(1) of Directive 2003/88.
- 19 In those circumstances, the Bundesarbeitsgericht (Federal Labour Court) decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

‘Do Article 31(2) of the [Charter] and Article 7 of Directive [2003/88] 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?’

Consideration of the question referred

- 20 By its question, the referring court asks, in essence, whether Article 31(2) of the Charter and Article 7 of Directive 2003/88 must be interpreted as precluding a provision in a collective labour agreement under which, in order to determine whether the threshold of hours worked granting entitlement to overtime pay is reached, the hours corresponding to the period of paid annual leave taken by the worker are not to be taken into account as hours worked.
- 21 First, it should be recalled that, in accordance with Article 7(1) of Directive 2003/88, ‘Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks’.
- 22 Although, under the wording of that provision, it is for the Member States to lay down the conditions for the exercise and implementation of the right to paid annual leave, they must not make the very existence of that right, which derives directly from that directive, subject to any preconditions whatsoever (judgment of 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraph 34 and the case-law cited).
- 23 Secondly, the Court has held, with regard to Article 7 of Directive 2003/88, that 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 whose implementation by the competent national authorities must be confined within the limits expressly laid down by that directive (judgment of 6 November 2018, *Kreuziger*, C-619/16, EU:C:2018:872, paragraph 28 and the case-law cited).
- 24 Furthermore, the right to paid annual leave is, as a principle of EU social law, not only particularly important, but is also expressly laid down in Article 31(2) of the Charter, which Article 6(1) TEU recognises as having the same legal value as the Treaties (judgment of 25 June 2020, *Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca SpA*, C-762/18 and C-37/19, EU:C:2020:504, paragraph 54 and the case-law cited).
- 25 Thus, Article 7(1) of Directive 2003/88 reflects and gives concrete expression to the fundamental right to an annual period of paid leave, enshrined in Article 31(2) of the Charter (see, to that effect, judgment of 8 September 2020, *Commission and Council v Carreras Sequeros and Others*, C-119/19 P and C-126/19 P, EU: C:2020:676, paragraph 115). While the latter provision guarantees the right of every worker to an annual period of paid leave, the former provision implements that principle by fixing the duration of that period.
- 26 In that regard, it must be recalled that compliance with the Charter is required, as is apparent from Article 51(1) thereof, when Member States are implementing EU law.
- 27 Since the legislation at issue in the main proceedings constitutes such an implementation of Directive 2003/88, it is in the light of Article 31(2) of the Charter that Article 7(1) of that directive must be interpreted in order to determine whether that provision precludes such legislation.
- 28 Thirdly, as regards the aim of Directive 2003/88, it should be recalled that, according to recital 4 thereof, the objective of that directive is to improve workers’ safety, hygiene and health at work. Recital 5 of that directive, for its part, states that workers should have adequate rest periods.
- 29 In that context, Article 1 of Directive 2003/88 provides that the directive lays down minimum safety and health requirements for the organisation of working time as regards, in particular, minimum periods of annual leave.

- 30 In the light of those objectives, the Court has held that the right to paid annual leave, as laid down in Article 7 of Directive 2003/88, has the dual purpose of enabling the worker both to rest from carrying out the work he or she is required to do under his or her contract of employment and to enjoy a period of relaxation and leisure (judgment of 25 June 2020, *Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca SpA*, C-762/18 and C-37/19, EU:C:2020:504, paragraph 57 and the case-law cited).
- 31 It is with a view to ensuring effective protection of his or her health and safety that the worker must normally be entitled to actual rest (see, to that effect, judgment of 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 23).
- 32 It follows that incentives not to take leave or to encourage employees not to do so are incompatible 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. Thus, any practice or omission of an employer that may potentially deter a worker from taking his or her annual leave is equally incompatible with the purpose of the right to paid annual leave (judgment of 6 November 2018, *Kreuziger*, C-619/16, EU:C:2018:872, paragraph 49 and the case-law cited).
- 33 For this reason, it has been held that the purpose of normal remuneration being received during the period of paid annual leave is to allow the worker actually to take the days of leave to which he or she is entitled. When the remuneration paid on account of the entitlement to paid annual leave provided for by Article 7(1) of Directive 2003/88 is less than the normal remuneration that the worker receives during periods actually worked, the worker might well be encouraged not to take his or her paid annual leave, at least during periods of actual work, as it would lead to a reduction in his or her remuneration during those periods (judgment of 13 December 2018, *Hein*, C-385/17, EU:C:2018:1018, paragraph 44 and the case-law cited).
- 34 Similarly, the Court held that a worker could be deterred from exercising his or her right to annual leave on account of a financial disadvantage, even if that disadvantage materialises at a later date, namely during the period following that of the annual leave (see, to that effect, judgment of 22 May 2014, *Lock*, C-539/12, EU:C:2014:351, paragraph 21).
- 35 In the present case, the referring court appears to take the view that Paragraph 4.1.2 of the MTV could be capable of deterring a worker from exercising his or her right to paid annual leave, in so far as that paragraph provides that only hours worked may, for the purposes of the possible entitlement to overtime pay, be taken into account when establishing whether the worker exceeded the threshold of the regular monthly working hours quota.
- 36 In that regard, it is apparent from the order for reference that the applicant in the main proceedings worked 121.75 hours during the first 13 working days of August 2017 and then took annual leave during the remaining 10 working days in that month. If he had worked during those last 10 days, he would have worked 84.7 hours in addition to the 121.75 hours, so that, subject to the verification to be carried out by the referring court, the number of hours worked in that month would have been 206.45 and would have exceeded by 22.45 hours the threshold of the number of hours worked giving rise to entitlement to overtime pay.
- 37 However, since, in accordance with Paragraph 4.1.2 of the MTV, the reference unit for fixing the threshold number of hours taken into account for overtime pay is defined on a monthly basis, the fact that the applicant in the main proceedings took days of annual leave in the month in which he worked overtime had the effect, pursuant to Paragraph 4.1.2, that the monthly threshold of 184 hours was not reached.
- 38 In those circumstances, the exercise by the applicant in the main proceedings of his right to leave had the effect that the remuneration received for August 2017 was lower than that which he would have received if he had not taken leave during that month.
- 39 Similarly, if a worker takes leave at the beginning of a month, the application of the collective labour agreement at issue in the main proceedings could also result in a reduction in remuneration for that month, since the overtime worked, as the case may be, by that worker following the leave could be

cancelled out by the days of leave taken at the beginning of the month. As was pointed out in paragraph 34 of this judgment, a financial disadvantage which materialises at a later date, namely during the period following that of the annual leave, may deter the worker from exercising his or her right to annual leave (see, to that effect, judgment of 22 May 2014, *Lock*, C-539/12, EU:C:2014:351, paragraph 21).

40 Consequently, a mechanism for accounting for hours worked, such as that at issue in the main proceedings, under which taking leave is liable to entail a reduction in the worker's remuneration, which is reduced by the supplement provided for overtime actually worked, is such as to deter the worker from exercising his or her right to paid annual leave during the month in which he or she worked overtime, which it is for the referring court to ascertain in the case in the main proceedings.

41 As recalled in paragraph 32 of this judgment, any practice or omission by an employer that may potentially deter a worker from taking his or her annual leave is incompatible with the purpose of the right to paid annual leave.

42 Such a finding cannot be called into question by the fact, noted by the referring court, that the acquisition of the right to overtime pay is linked, under Paragraph 4.1.2 of the MTV, to the hours actually 'worked'. Subject to the verification to be carried out by that court in that regard, although it is common ground that the applicant in the main proceedings worked overtime to which a 25% increase in pay was to be applied, entitlement to overtime pay was cancelled out by the fact that the reference unit to set the threshold of the number of hours taken into account for that increase in pay is defined monthly and that the applicant exercised his right to paid annual leave during the month in which he worked overtime.

43 Furthermore, in the case which gave rise to the judgment of 13 December 2018, *Hein* (C-385/17, EU:C:2018:1018, paragraph 47), as the referring court noted, the Court addressed the question of the need to take account of overtime worked by a worker in calculating the normal remuneration due under the paid annual leave provided for by Article 7(1) of Directive 2003/88 and, thus, of the conditions for taking account of overtime in determining that normal remuneration, in order that the worker may enjoy, during that leave, economic conditions which are comparable to those that he or she enjoys when working.

44 That question must be distinguished from the question relating to the threshold for triggering payment for overtime actually worked by the worker in respect of a given monthly period, such as that at issue in the present case, with the result that the conditions laid down by the Court in paragraph 47 of that judgment with regard to normal remuneration in respect of paid annual leave are not relevant in the present case.

45 Consequently, a mechanism for accounting for hours worked such as that at issue in the main proceedings is not compatible with the right to paid annual leave provided for in Article 7(1) of Directive 2003/88.

46 It follows from all the foregoing considerations that Article 7(1) of Directive 2003/88, read in the light of Article 31(2) of the Charter, must be interpreted as precluding a provision in a collective labour agreement under which, in order to determine whether the threshold of hours worked granting entitlement to overtime pay is reached, the hours corresponding to the period of paid annual leave taken by the worker are not to be taken into account as hours worked.

Costs

47 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Seventh Chamber) hereby rules:

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, read in the light of Article 31(2) of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding a provision in a collective labour agreement under which, in order to determine whether the threshold of hours worked granting entitlement to overtime pay is reached, the hours corresponding to the period of paid annual leave taken by the worker are not to be taken into account as hours worked.

[Signatures]

* Language of the case: German.