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ECJ 13.1.2022, C-514/20, Koch

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The judgment:

Article 7(1) of the Working Time Directive 2003/88/EC, read in the light of Article 31(2) of the Charter of Fundamental Rights of the EU, 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.

The provision in the CBA for Temporary Workers

- Mehrarbeitszuschläge werden für Zeiten gezahlt, die in Monaten mit 23 Arbeitstagen über 184 geleistete Stunden hinausgehen. Der Mehrarbeitszuschlag beträgt 25 %.
- ‘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%.
- French: heures accomplies

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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.

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.

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..

Judgment 25.11.21,C- 233/20 Job Medium

29. It should be borne in mind that the right to annual leave constitutes only one of two aspects of the right to paid annual leave as a fundamental principle of EU social law. That fundamental right also includes, as a right which is consubstantial with the right to ‘paid’ annual leave, the right to an allowance in lieu of annual leave not taken upon termination of the employment relationship …

Judgment 9.12.2021, C- 217/20 Staatssecretaris van Financiën

31 The Court has found, in that regard, that incapacity for work due to illness is, as a rule, not foreseeable and beyond the worker's control. That is, in essence, also what follows from Convention No 132 of the International Labour Organisation of 24 June 1970 concerning Annual Holidays with Pay, as revised, the principles of which must be taken into account, as stated in recital 6 of DIR 2003/88, when interpreting that directive….

CONCLUSIONS

- Paid annual leave is a particularly important principle of Union social law;
- Art. 31 is an individual fundamental right which employees can use directly against private employers;
- the fundamental right has a dual nature, integrating leave and payment;
- leave is part of the rest period;
- the fundamental right is concretized by the directive, so that the directive and the fundamental right have identical content;
- - ILO Convention 132 must be taken into account when interpreting the directive in such a way that concrete legal consequences can be derived from it;
- - the Court treats collective agreements on leave as part of national law which must comply with European law. There is no scope for deterioration in collective agreements. Art. 28 of the Charter was not even examined in this context and obviously does not play a role.

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ECJ C-232/20 Daimler - date of pronouncement: 17..3.2022

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- Art. 5 (5). Member States shall take appropriate measures, in accordance with national law and/or practice, with a view to preventing misuse in the application of this Article and, in particular, to preventing successive assignments designed to circumvent the provisions of this Directive. They shall inform the Commission about such measures.

- Is the assignment of a temporary agency worker to a user undertaking no longer to be regarded as ‘temporary’ for the purposes of Article 1 of the Temporary Agency Work Directive as soon as the employment takes place in a job which is permanent and not performed as cover?

2. Is the assignment of a temporary agency worker for a period of less than 55 months no longer to be regarded as ‘temporary’ for the purposes of Article 1 of the Temporary Agency Work?

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ECJ C-311/21 Time Partner

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Art. 5 Principle of equal treatment

1. The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, **at least those that would apply** if they had been recruited directly by that undertaking to occupy the same job.

Exemptions

2. As regards pay, Member States may, after consulting the social partners, provide that an **exemption be made to the principle established in para 1** where temporary agency workers who have a permanent contract of employment with a temporary-work agency continue to be paid in the time between assignments.

3. Member States may, after consulting the social partners, give them, at the appropriate level and subject to the conditions laid down by the Member States, the option of upholding or concluding collective agreements which, while **respecting the overall protection of temporary agency workers**, may establish arrangements concerning the working and employment conditions of temporary agency workers which may differ from those referred to in paragraph 1.

Our Application

(1) The principle of equal treatment laid down in Art. 5(1) and (3) of DIR 2008/104/EC precludes national legislation or legal practice which allows derogations from the terms and conditions of employment applicable in user undertakings under collective agreements to the detriment of temporary agency workers.

Our Application

(2) The principle of equal treatment laid down in Art. 5(1) and (3) of DIR 2008/104/EC precludes national legislation or legal practice if it provides for derogations by CBA for temporary workers from the basic terms and conditions of employment, within the meaning of Article 3(1)(f) of DIR 2008/104/EC, applicable in the user undertakings without requiring overall protection of temporary workers as constitutive content of these CBAs.

Our Application

(3) The principle of equal treatment laid down in Art. 5(1) and (3) of DIR 2008/104/EC precludes national legislation or legal practice which allows derogations by CBA from working conditions applicable in user undertakings for temporary agency workers which are not covered by Art. 3(1)(f) of the directive.

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(4) A derogation from the principle of equal treatment with regard to pay under Art. 5 of DIR 2008/104/EC by way of CBA is in any case impermissible if there is no employment relationship of indefinite duration between the user undertaking and the temporary worker.

5 In the alternative: The principle of respect for overall protection in Art. 5(3) of DIR 2008/104/EC requires that terms and conditions which deviate downwards at one point in the collective agreement must be compensated for by terms and conditions at another point which are above the level of the hirer.

6. in the alternative: A national provision which does not provide for a time limit on the derogation from the principle of equal treatment for temporary agency workers in relation to pay and does not specify the time limit for the requirement that the posting must be 'temporary' does not properly transpose Articles 1 and 5 of Directive 2008/104/EC.

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Panta Rhei –Thanks for your attention

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