Key Issues: **Social Policy – Working Time – Annual Leave - Preliminary Ruling**

Case: **Koch Personaldienstleistungen GmbH**

Reference: **Case C-514/20, CJEU (Seventh Chamber), 13 January 2022**

Legislation: **Directive 2003/88/EC**

Background

In German national law, the Manteltarifvertrag für Zeitarbeit (Framework Collective Agreement for temporary employment – "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.*

Paragraph 4.1.2 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%.'

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.

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.

After his action was dismissed at first instance and on appeal, DS brought an appeal on a point of law (*Revision*) before the Bundesarbeitsgericht (Federal Labour Court, Germany.

The referring court expressed 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. In those circumstances, the Bundesarbeitsgericht (Federal Labour Court) decided to stay the proceedings and refer a question to the Court of Justice of the EU (CJEU) for a preliminary ruling on Council Directive 2003/88/EC.

Consideration by CJEU

First, the CJEU noted 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*'.

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.

Secondly, the CJEU 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.

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 of Fundamental Rights of the European Union ('the Charter'), which Article 6(1) TEU recognises as having the same legal value as the Treaties.

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. 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

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.

The CJEU held that:

Article 7(1) of Directive 2003/88/EC, 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.

Why is this decision important?

The Working Time Directive 20003/88 contains many potential traps for the unwary employer. The Directive has its origin in "health and safety" law which informs much of the jurisprudence of the CJEU and also means an employer must pay particular attention to time off, holidays and annual leave when calculating working hours.

NOTE: The Working Time Regulations (NI) 1998 form part of "Retained Law" for the purposes of the European Union (Withdrawal) Act 2018 ("the Act"). By section 6 of the Act, UK courts and tribunals are not bound by decisions of the CJEU made after "exit day". However, a UK court or tribunal may have regard to any such decision of the CJEU so far as it is relevant to any matter before the court or tribunal.

CLfE (1/2022)

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